

**BEFORE THE STATE BOARD OF MEDIATION
STATE OF MISSOURI**

RICK SENSMEYER,)	
)	
Petitioner,)	
)	
v.)	Public Case No. RD 2001-051
)	(Cross Reference UC 1998-033,
CITY OF ST. LOUIS,)	AC 1994-001, R 1993-016, and
)	R 1986-023)
Respondent,)	
)	
and)	
)	
AFSCME, LOCAL 410,)	
)	
Incumbent.)	

JURISDICTIONAL STATEMENT

The State Board of Mediation is authorized to hear and decide issues concerning appropriate bargaining units and majority representation by virtue of Section 105.525 RSMo. 2000. On September 20, 2001, the Board conducted an election to determine whether the American Federation of State, County, and Municipal Employees, Local 410 (hereinafter the Union) would be decertified as the bargaining representative for certain employees for the City of St. Louis (hereinafter the City) employed at Lambert-St. Louis International Airport (hereinafter the Airport). The results of the election were 69 votes against retaining the Union as the bargaining representative and 61 votes in favor of retaining the Union as the bargaining representative. The Union filed timely objections to the conduct of the election.

The Chairman, pursuant to 8 CSR 40-2.160, investigated the Union objections and determined that a hearing was necessary to resolve the issues raised in the objections. A hearing on this matter was held on November 16, 2001, in St. Louis, Missouri, at which the Petitioner, representatives of the Union, and representatives of the City were present. The case was heard by State Board of Mediation Chairman John Birch, Employee Member LeRoy

Kraemer, and Employer Member Lois Vander Waerdt. At the hearing, the parties were given full opportunity to present evidence and make their arguments. At the close of taking evidence, the Union abandoned two of its objections. The parties were given an opportunity to file briefs in this matter. The Union and the City filed briefs in support of their respective positions. After a careful review of the evidence and the arguments of the parties, the Board sets forth the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

The Airport services commercial passenger flights and is subject to Federal Aviation Administration (FAA) regulations. The Airport is under the direction and control of the Director of Airports. Next in the line of authority is the Deputy Director of Airports. Patrick Martocci is the Human Resources Manager for the Airport and he reports directly to the Director of Airports. The Director's Office opens at 8:30 a.m.

Bill Korte is the Airfield Administrator and he reports to the Deputy Director of Airports. Mr. Korte is responsible for all airfield maintenance operations including field maintenance, airport vehicle maintenance, communication center operations, and landscaping. Leroy Rogers is the Airfield Maintenance Supervisor. Mr. Rogers is the head of the Airfield Maintenance Department. Mike Bryant is the Lead Foreman in the Airfield Maintenance Department. Arthur Green is a Foreman in the Airfield Maintenance Department.

Paul E. Mason II is the Chief of the Airport Police Department. Chief Mason reports directly to the Director of Airports. The Airport Police Department is a 123-person full-service Police Department and is responsible for providing security for the airfield, planes, and passengers. Security at the Airport is dictated by FAA regulations. A perimeter fence encloses the airfield. The perimeter fence has gates for ingress and egress. The Airport Police are responsible for security around the perimeter fence and gates. Contract Security Guards, working under the supervision of an Airport Police Captain, control ingress and egress at the

gates. To enter a gate, an individual must either have an appropriate Airport ID or be escorted by another individual with the appropriate Airport ID.

The Airport Police maintain areas designated as “clear zones” around the perimeter fence. Additionally, gates are designated by the Airport Police as “areas of concern” because they provide direct access to the ramp or airfield. To prevent breaches in security, the Airport Police do not permit individuals to stand or loiter outside the gates or near the perimeter fence.

The Airport has a free speech and picketing policy that was approved by the Deputy Director of Airports. If an individual or group wanted to picket or distribute literature at the Airport, they would send a written request to the Airfield Administrator, Bill Korte. Mr. Korte would issue written permission to picket or distribute literature to the individual or group. Mr. Korte would also forward a letter to Chief Mason advising him that the individual or group of individuals has permission to be in the designated area of the Airport. Chief Mason would forward Mr. Korte’s letter to the Commander, Bureau of Police Operations. The Commander would forward the letter to his personnel.

In addition to the formal free speech and picketing policy, the Airport had an informal policy concerning Union activities. If a Union representative wanted to meet with a particular group of airport workers or to distribute Union literature, the Union representative would contact the Airport’s Human Resource Manager, Pat Martocci, and receive verbal permission from Mr. Martocci to meet with the workers or distribute literature. Union representatives are not required to submit their requests in writing and Union representatives generally do not receive permission from Mr. Martocci in writing. Upon receiving a request from a Union representative to meet with airport workers in a particular Department, Mr. Martocci contacts the head of the Department in question to determine the best time for the Union representative to meet with the workers. On occasion, Mr. Martocci will have the Union representative contact the Department Head directly concerning an appropriate time. Union representatives are generally allowed to

meet with workers during shift changes, breaks, and lunchtime. Union representatives are expected to keep the meetings to reasonable lengths of time.

Upon granting a Union representative permission to meet with airport workers or to distribute literature, Mr. Martocci contacts the Airport Police Department by telephone and advises them that the Union representative will be in a designated area of the Airport. When contacting the Airport Police Department, Mr. Martocci usually follows the chain of command and contacts Chief Mason. Generally, a telephone call from Mr. Martocci to the Airport Police is sufficient to permit Union representatives to conduct Union activities at the Airport and the Airport Police do not require Union representatives to have written permission. However, Mr. Martocci has no control over Airport Police Department security policies and Mr. Martocci could not grant an individual permission to be in an area in contravention of FAA security regulations.

The Union is the certified exclusive bargaining representative for a unit consisting of all civil service employees of the City working at the Airport in the following job classifications: Utility Worker; Laborer (except limited-term laborers of less than 6 months); Heavy Equipment Mechanic; Airfield Maintenance Worker; Automotive Service Worker; Assistant Automotive Mechanic; Custodians; Lead Custodians; Inventory Control Clerks I and II; Gardeners; Park Keeper I and II; Building Inspector I and II; Drafter I and II; Lead Airfield Maintenance Worker; and Airfield Operations Specialists. The Union has been the bargaining representative for the unit since September 22, 1986. The Lead Airfield Maintenance Workers have been included in the unit since January 10, 1994.

On June 29, 2001, the Petitioner, Rick Sensmeyer, filed a petition to decertify the Union as the bargaining representative for the unit. The Chairman of the Board of Mediation held a preliminary conference with the parties concerning the petition and the parties stipulated to a consent election.

Sometime after the preliminary conference in this case, the City reclassified ten Airfield Maintenance Workers within the Airfield Maintenance Department as Painters. Workers classified as Painters are included in a bargaining unit represented by the Carpenters' Union. Upon being reclassified as Painters, the workers became part of the bargaining unit represented by the Carpenters' Union.

The City was responsible for preparing the voter eligibility list (commonly called the Excelsior List) and filing it with the Board on or before August 24, 2001. Amy Brown, Employee Relations Supervisor in the City's Department of Personnel, made the initial request for preparation of the voter eligibility list. Ms. Brown's request was ultimately forwarded to the City's Comptroller's Office. The voter eligibility list was prepared by the Management Information Systems Section within the City's Comptroller's Office. On August 20, 2001, Ms. Brown forwarded the voter eligibility list to the Board. No one in the City's Department of Personnel reviewed the voter eligibility list to verify its accuracy before Ms. Brown forwarded the list to the Board.

Although the voter eligibility list should have contained the names and addresses of all 205 eligible voters, the names and addresses of eleven Lead Airfield Maintenance Workers within the Airfield Maintenance Department were omitted from the list. The Lead Airfield Maintenance Workers are included in the bargaining unit and were eligible to vote in the decertification election. Nine of the eleven Lead Airfield Maintenance Workers omitted from the voter eligibility list are Union members and pay Union dues. The other two Lead Airfield Maintenance Workers are not Union members, but they pay fair share fees to the Union. The voter eligibility list also contained the names and addresses of nine of the Airfield Maintenance Workers who had been reclassified as Painters. Since the Painters were not eligible to vote in the decertification election, the Painters' names and addresses had been lined through.

On August 20, 2001, the Chairman mailed a copy of the voter eligibility to the Petitioner and the Union. In his cover letter, the Chairman requested that the Petitioner and the Union review the voter eligibility list and inform him of any problems. Neither party informed the Chairman of any problems with the voter eligibility list. No Union official reviewed the voter eligibility list to determine if it was accurate.

City workers are paid bi-weekly. Union dues are deducted from the paychecks of City employees that are Union members. Additionally, the City granted to the Union the right to fair share fees from City employees who are not Union members. These fair share fees are deducted from the paychecks of City workers who are not Union members.

Bi-weekly, the City's Comptroller's Office produces a payroll report for each Union showing the following information for each worker: name, social security number, Department, pay location (for most workers), the current bi-weekly fair share fees or Union dues deduction, year-to-date fair share fees or Union dues deducted, and job classification (for most workers). This payroll report is provided bi-weekly to each Union representing City employees. City officials and Union officials could have used this payroll report to verify the accuracy of the voter eligibility list. However, no City official or Union official verified the accuracy of the voter eligibility list.

The Union also maintains records on its Union members. The Union should have had the names and addresses of its members. During the election cycle, the Union could have used its own records when conducting its mailing and telephone calling campaigns.

However, during the election cycle, the Union relied exclusively upon the voter eligibility list when conducting its mailing and telephone calling campaigns. The Union used the voter eligibility list because it contained the addresses of the employees. The Union entered the voter eligibility list into its computer system and used this information for mailing information to eligible voters. The Union mailed various types of leaflets to City employees that were eligible

to vote in the decertification election. The Union also used the voter eligibility list to identify City employees that they wanted to communicate with about the decertification election. The Union's Shop Steward was also instructed to use the voter eligibility list when contacting workers at the job site concerning the decertification election.

The decertification election was well publicized within the Airfield Maintenance Department. It was the subject of much discussion among the employees in the Airfield Maintenance Department with individuals for the Union and against the Union expressing their opinions. One of the Union's own witnesses testified that everyone on the day shift in the Airfield Maintenance Department knew about the decertification election. Four of the Lead Airfield Maintenance Workers work on the day shift and were present at various times when the decertification election was being discussed by the employees.

On September 11, 2001, four commercial jet airliners were hijacked by terrorists. Two of the jets were crashed into the twin towers of the World Trade Center in New York City, completely destroying the World Trade Center and killing thousands of people. One jet was crashed into the Pentagon Building in Washington D.C., killing hundreds of people. The fourth jet crashed in rural Pennsylvania killing all on board. The FAA ordered a ground stop of all aircraft in the United States and all airports in the United States were shut down. New FAA security directives were issued for all airports and airports were not allowed to reopen until they met these new FAA security measures. Thousands of travelers were stranded at the airports across the United States and the federal government issued numerous warnings about possible further terrorist attacks.¹

After the terrorist attacks of September 11, 2001, the Airport was put on heightened security and additional security measures were put in place. The Airport Police Department

¹ As an administrative agency, the Board may take official notice of matters of which a Court may take judicial notice. *See*, Section 536.070(6) RSMo. 2000. Courts may take judicial notice of matters of common knowledge and matters of current history as related to affairs of public interest and concern. *State ex rel. Crutcher v. Koeln*, 61

canceled all days off for Airport Police Officers and some Airport Police Officers worked double shifts. St. Louis County Police Officers were brought in to assist the Airport Police until such time Airport maintenance personnel could erect additional fences and jersey barriers in designated areas around the Airport. The Airport Police Department also doubled the number of contract Security Guards. Chief Mason had daily meetings with his Commanders and the Commanders, in turn, had daily meetings with the Supervising Police Officers.

After September 11, 2001, the Airport Police were extra vigilant. The Airport Police increased the frequency of their patrolling. Special emphasis was placed upon perimeter security. The Airport Police were attempting to keep the “clear zones” as clear as possible. There was also concern that an individual might plant some kind of device on an Airport vehicle or on an Airport employee’s vehicle. The Airport Police began checking Airport vehicles by use of mirrors for planted devices. If an Airport Police Officer encountered an individual around the perimeter fence, gates or employee parking lots, the Police Officer would ask the individual for identification. Next the Police Officer would ask the individual what they were doing. If the individual did not have written permission to be in the area or the Airport Police Department had not been informed that the individual had permission to be in the area, the Police Officer would ask the individual to move along.

The workers in the Airport’s Airfield Maintenance Department work on three shifts: A, B, and C. Shift A is the day shift and the workers begin work at 7:00 a.m. Shift B is the evening shift and the workers begin work at approximately 3:00 p.m. Shift C is the midnight shift. Shift C workers get off work at 7:30 a.m. Shift C workers have wash-up time between 7:15 a.m. and 7:30 a.m. During wash-up time the workers are permitted to do “basically what they want to do.” (Tr. 182).

S.W.2d 750, 756 (Mo. banc 1933). *See also, Bowman v. Kansas City*, 233 S.W.2d 26, 30 (Mo banc 1950). Therefore, the Board can take official notice of the events on September 11, 2001.

In early September, Joann Williams, Business Agent for the Carpenters' Union, contacted Pat Martocci, Human Resource Manager for the Airport, to obtain permission to meet with the newly reclassified Painters in the Airfield Maintenance Department. Ms. Williams wanted to speak to the new Painters about joining the Carpenters' Union. Mr. Martocci gave Ms. Williams permission to meet with the Painters in the Airfield Maintenance Building. The meeting was to take place on September 13, 2001. Mr. Martocci called Leroy Rogers, Airfield Maintenance Supervisor, and told Mr. Rogers to contact Ms. Williams and work out an appropriate time for the meeting.

On September 13, 2001, all of the Painters in the Airfield Maintenance Department had worked the midnight shift, Shift C, on a special project and were scheduled to get off work at 7:30 a.m. The meeting with the Carpenter's Union was scheduled to be held from 6:30 a.m. to 7:30 a.m. in the break room at the Airfield Maintenance Building.

Ms. Williams and an assistant brought cheesecake, pastries, and hats (with the Carpenters' Union Logo) to the meeting. Ms. Williams' assistant distributed 10 to 15 Carpenters' Union hats. The only person positively identified as receiving a hat was Adrian Mrosewski. Mr. Mrosewski is on the painting crew.

Other individuals, in addition to the Painters, attended the Carpenters' meeting. The midnight shift was scheduled to get off at 7:30 a.m. and some Airfield Maintenance Workers working the midnight shift were in the break room at that time. Additionally, the day shift, Shift A, was scheduled to go to work at 7:00 a.m. and some of the Airfield Maintenance Workers working the day shift were in the break room prior to going to work. Tim Tippit, the Union's Shop Steward, worked the day shift. He walked in on the Carpenters' meeting. Mr. Tippit ate a piece of cheesecake and enjoyed himself. However, Mr. Tippit testified that the cheesecake did not affect the way he voted in the decertification election. Additionally, Joann Williams had previously been a Business Agent for Local 410, and many of the employees in the Airfield

Maintenance Department knew Ms. Williams. Some of the individuals attending the Carpenters' meeting were there just to say hello to Ms. Williams.

At 7:00 a.m., Leroy Rogers pulled all of his day shift workers out of the Carpenters' meeting and sent them to work, but the Painters and some Airfield Maintenance Workers working the midnight shift stayed at the meeting. The Carpenters' meeting ended at approximately 7:20 a.m.

The Airfield Maintenance Department has a policy regarding the posting of Union documents and notices. All Union documents have to be posted on the Union bulletin board. Union documents have to be on Union letterhead and they have to have an expiration date on the document. Union documents cannot be posted on the windows and walls of the Airfield Maintenance Building.

Prior to the decertification election, fliers encouraging workers to decertify the Union and join the Carpenters' Union were circulated and posted in the Airfield Maintenance Department. These fliers appeared to be produced on a computer and were printed in black ink on plain white paper. The fliers also appeared to have been copied on a copy machine. The fliers were not on a Union letterhead and the fliers did not contain a Union logo. There is no credible evidence as to who produced, distributed, and posted the fliers. In violation of Department policy, the fliers were posted on the bulletin boards, on at least one wall, and on at least one window in the Airfield Maintenance Building. Pat Martocci, Human Resource Manager for the Airport, was unaware of the fliers being improperly posted. Leroy Rogers, Airfield Maintenance Supervisor, did not see any of the improperly posted fliers. The Foremen in the Airfield Maintenance Department had been instructed to remove any improperly posted fliers. Mike Bryant, Lead Foreman, removed some improperly posted fliers.

At sometime prior to the decertification election, an argument occurred between Tim Tippit, the Union's Shop Steward, and Richard Brucker, a member of the Carpenters' Union.

The incident involved some name-calling and “slandering” between Mr. Tippit and Mr. Brucker. Mike Dattoli, a Union member, and Bruce Crawford, a Painter, were also involved in the incident. Leroy Rogers and Mike Bryant had a meeting with Mr. Tippit and Mr. Dattoli. Mr. Rogers told Mr. Tippit and Mr. Dattoli that such conduct would stop. Mr. Rogers and Mr. Bryant also held a separate meeting with Mr. Brucker and Mr. Crawford and informed those individuals that such conduct would stop.

Mr. Tippit also testified that comments regarding his Union activities appeared on his quarterly employee evaluation for the calendar quarter ending September 30, 2001. However, Mr. Tippit’s quarterly employee evaluation was introduced into evidence and the evaluation does not contain any reference to Mr. Tippit’s Union activities. The evaluation does indicate that the Airport paid Mr. Tippit his regular salary while he served as the Union’s election observer on the day of the decertification election.

Mr. Tippit was ultimately transferred to the midnight shift. However, the transfer was not related to Mr. Tippit’s Union activities. For several years, there had been a personal conflict between Mr. Tippit and Mike Bryant, Lead Foreman. Apparently, the conflict between Mr. Tippit and Mr. Bryant escalated and Mr. Tippit was notified on October 12, 2001, that he would be transferred to the midnight shift.

The Union never requested permission to hold a meeting with the workers inside the Airfield Maintenance Building. However, on Friday, September 14, 2001, Perry Molens, Business Agent for the Union, called Bill Duffy, the City’s Personnel Director, to complain about the Carpenters’ meeting. Mr. Duffy offered to allow the Union to meet with the Airfield Maintenance Workers inside the Airfield Maintenance Building. Mr. Molens told Mr. Duffy that he would call him back on Monday, September 17, 2001.

On the afternoon of September 14, 2001, Robert Patterson, a Union Business Agent, and two other individuals, Wendy Caruthers and Karen Molens, were attempting to distribute

Union literature to the workers outside the gate to the Airfield Maintenance Department. It was during shift change: Shift A was getting off work and Shift B was going to work. The trio had been distributing Union literature for approximately twenty minutes when an Airport Police Officer arrived at the scene. The Police Officer asked what they were doing and Robert Patterson explained that they were distributing Union literature to the workers. The Police Officer stated that they needed written permission to distribute literature. The Police Officer also stated that it was inappropriate for them to be at that location and told them to leave. Mr. Patterson apologized and the three Union workers left. At no time was Mr. Patterson, Ms. Caruthers, or Mrs. Molens officially detained or taken into custody by the Airport Police Officer.

On September 14, 2001, a conference call was held between Perry Molens and Robert Patterson, Business Agents for the Union, and Pat Martocci, Human Resource Manager for the Airport. Mr. Molens complained to Mr. Martocci about the Airport Police prohibiting Union representatives from distributing leaflets to the workers outside the gate to the Airfield Maintenance Department. Mr. Martocci told Mr. Molens that the problem was due to the heightened security measures implemented at the Airport since the terrorist attacks on September 11, 2001. Mr. Molens requested written permission from Mr. Martocci to distribute leaflets outside the gate to the Airfield Maintenance Department. However, Mr. Martocci told Mr. Molens written permission was not necessary and that he (Mr. Martocci) would take care of the problem. Mr. Martocci did not give Mr. Molens written permission because Mr. Martocci believed, in accordance with the Airport's informal policy regarding Union activity, written permission was not necessary.

During the conference call, Mr. Molens also complained to Mr. Martocci about the Carpenters' meeting inside the Airfield Maintenance Building. Mr. Martocci told Mr. Molens that Joann Williams had called him and requested the meeting. Mr. Martocci told Mr. Molens that he had approved the meeting. At the time Mr. Martocci approved the Carpenters' meeting, it

was his understanding that the Carpenters' Union Representative was going to meet only with the newly reclassified Painters within the Airfield Maintenance Department.

After the conference call, Mr. Martocci placed a telephone call to the Airport Police Department concerning the Union's desire to distribute leaflets outside the gate to the Airfield Maintenance Department. While it was Mr. Martocci's practice to follow the chain of command and speak first with Chief Mason, Mr. Martocci could not recall whom he spoke to in the Airport Police Department. During that telephone call, Mr. Martocci stated that, if it did not violate FAA security regulations, the Union representatives had his permission to distribute leaflets to the workers outside of the gate to the Airfield Maintenance Department. However, this information was evidently not passed on to the appropriate individuals within the Airport Police Department.

On the morning of September 17, 2001, Perry Molens and Robert Patterson were attempting to distribute Union literature to the workers outside the gate to the Airfield Maintenance Department. It was during shift change: Shift C was getting off work and Shift A was going to work. Two Airport Police Officers arrived at the scene and told Mr. Molens and Mr. Patterson that they could not be at that location. Mr. Molens and Mr. Patterson explained to the Police Officers that they were Union Officials on Union business and that they had permission from Pat Martocci to be at that location. The Police Officers stated that they needed written permission and asked to see their documentation. Mr. Molens and Mr. Patterson did not have written permission. The Police Officers stated that if they did not have written permission, they would have to leave. The Police Officers ran Mr. Molens' and Mr. Patterson's drivers' licenses and then asked them to leave. Mr. Molens and Mr. Patterson left. At no time was Mr. Molens or Mr. Patterson officially detained or taken into custody by the Airport Police Officers.

On September 17, 2001, Mr. Molens called Mr. Duffy, City Personnel Director, and told him that the Union would like to meet with the Airfield Maintenance Workers inside the Airfield Maintenance Building. Mr. Martocci, Human Resource Manager for the Airport, granted the

Union permission to hold the meeting. Mr. Martocci called Leroy Rogers, Airfield Maintenance Supervisor, to inform him that the Union was going to hold a meeting inside the Airfield Maintenance Building. The meeting took place prior to September 20, 2001. The meeting was scheduled to be held between 6:30 a.m. and 7:00 a.m. in the break room in the Airfield Maintenance Building. The meeting was scheduled around the morning shift change. The day shift, Shift A, would be going to work at 7:00 a.m. and the midnight shift, Shift C, would be coming off work at 7:30 a.m. The meeting began at approximately 6:30 a.m. and ended at approximately 7:20 a.m. Although the meeting was scheduled to end at 7:00 a.m., Leroy Rogers let the Union have an additional twenty minutes. By 7:20 a.m., the meeting was beginning to wind down and Mr. Rogers pulled his day shift workers out of the meeting and sent them to work.

Perry Molens, Business Agent for the Union, also held two meetings inside the Airport's Housekeeping Department. One meeting was held on September 19, 2001, and the second meeting was held on the day of the decertification election, September 20, 2001. Both meetings were held in the morning and the same twenty Housekeeping Department employees attended both meetings. Union representatives were also permitted to distribute literature in the Housekeeping Department on September 19, 2001, and September 20, 2001. Additionally, Union notices were posted on the Union bulletin board within the Housekeeping Department.

Prior to 7:00 a.m. on September 20, 2001, Perry Molens and his wife Karen Molens were attempting to distribute Union literature to the workers outside the gate to the Airfield Maintenance Department. It was during a shift change: Shift C was getting off work and Shift A was going to work. Mr. Molens was wearing a yellow and blue windbreaker which identified him as being a member of the Union. Mr. Molens also had identification pinned to his jacket identifying him as a Union representative.

A call came into the Airport Police Department regarding individuals soliciting outside the gate to the Airfield Maintenance Department. The Airport Police Dispatcher dispatched Airport Police Officer Roland Rount to the scene. Upon arriving at the gate, Officer Rount determined that Mr. Molens was a Union representative. Officer Rount asked Mr. Molens if he had permission to distribute literature outside the gate. Mr. Molens responded that he had permission from Pat Martocci. Officer Rount asked to see the written document giving Mr. Molens permission to distribute literature. Mr. Molens did not have written permission. Officer Rount contacted Sergeant Rodgers Allen, the Shift Supervisor. Sergeant Allen checked the daybook to see if there was an entry regarding Mr. Molens having permission to distribute literature. Sergeant Allen found no such entry. Sergeant Allen then contacted his Lieutenant, Ben Jones, to see if he had been informed of Mr. Molens having permission to distribute literature. Sergeant Allen also contacted his Assistant Sergeant, Sergeant Williams, to see if he had received any information regarding Mr. Molens having permission to distribute literature. Sergeant Allen determined that the Airport Police had not received approval for Mr. Molens to distribute literature. Therefore, Officer Rount told Mr. Molens that he would have to leave the gate area. Mr. and Mrs. Molens drove to the Airport's Main Terminal so that Mr. Molens could talk to Mr. Martocci. Officer Rount returned to the Airport Police Station to give a report to Sergeant Allen concerning the incident.

Sometime thereafter, Mr. Molens appeared at the Airport Police Station and asked to speak to a supervisor.² The individual sitting at the desk informed Sergeant Allen that a Union representative was at the desk and wanted to speak to a supervisor. Sergeant Allen responded. Sergeant Allen identified himself and asked Mr. Molens if he had a problem. Mr. Molens responded that he was a Union representative and that he was not being permitted to distribute Union literature outside the gate to the Airfield Maintenance Department. Sergeant

² The evidence concerning the exact sequence of events after Mr. And Mrs. Molens and Officer Rount left the gate to the Airfield Maintenance Department is unclear.

Allen told Mr. Molens that the Airport Police could not permit Mr. Molens to stand outside that gate without some evidence, written documentation or telephone call, from the Director's Office that he had permission to be outside the gate. Mr. Molens was causing a disturbance outside the Police Station so Sergeant Allen asked Mr. Molens to step inside. Sergeant Allen told Mr. Molens that if the Airport Police received confirmation from the Director's Office that Mr. Molens had permission to be outside the gate, he (Molens) would be permitted to stand there. Sergeant Allen directed Sergeant Williams to verify that Mr. Molens had permission to distribute literature outside the gate to the Airfield Maintenance Department.

Sergeant Williams called the Director's Office and was informed that Mr. Martocci had come to work early that morning due to the Union decertification election. Mr. Molens wanted to go to Mr. Martocci's office. Sergeant Williams and Officer Rount accompanied Mr. Molens to Mr. Martocci's office. Sergeant Williams and Officer Rount walked on the same side of Mr. Molens as they accompanied him to Mr. Martocci's office. Sergeant Williams walked next to Mr. Molens and Officer Rount walked a step behind Sergeant Williams.

Upon arriving at Mr. Martocci's office, Mr. Molens complained to Mr. Martocci that the Airport Police were not permitting him to distribute literature outside the gate to the Airfield Maintenance Department. Mr. Molens also complained to Mr. Martocci that the Airport Police would not validate his parking ticket. Mr. Martocci informed Sergeant Williams that Mr. Molens had permission to distribute literature outside the gate. Mr. Martocci also told Sergeant Williams to validate Mr. Molens parking ticket.

Once the Airport Police verified that Mr. Molens had permission to distribute literature outside the gate to the Airfield Maintenance Department, Mr. Molens was advised as to the areas he could not enter due to the heightened security and then Mr. Molens was permitted to return to the gate. However, Mr. and Mrs. Molens did not return to the gate because, by that time, the shift change at the Airfield Maintenance Department had already taken place. At no

time on September 20, 2001, was Mr. Molens or Mrs. Molens officially detained or taken into custody by the Airport Police.

Additionally, on the morning of September 20, 2001, the day of the decertification election, Robert Patterson, Union Business Agent, informed Willy Tannan, Union Shop Steward in the Airport's Housekeeping Department, that he (Patterson) had been told by Airport Officials that he would have to leave a certain area of the Airport. Mr. Patterson asked Mr. Tannan to inform Mr. Molens if he saw him. Thereafter, Mr. Tannan saw Mr. Molens, accompanied by Sergeant Williams and Officer Rount, enter Mr. Martocci's office. After Mr. Molens left Mr. Martocci's office, Mr. Tannan searched for him. Mr. Tannan found Mr. Molens and informed him that Mr. Patterson had been told to leave an area of the Airport. Mr. Molens and Mr. Tannan then searched for Mr. Patterson. They found Mr. Patterson at exit 12 or 13.

On September 20, 2001, the decertification election was held at the Airport. The election was by secret ballot and was conducted by the Chairman. The Petitioner served as an election observer and Ricky Russell, a Technician II, also served as an election observer on behalf of the Petitioner. Ron Foster, a Human Resource Specialist, served as an election observer on behalf of the City. Tim Tippet, an Airfield Maintenance Worker and Union Shop Steward, served as the election official on behalf of the Union. The City paid Mr. Tippet his regular salary on the day of the election.

At the election, ten of the eleven Lead Airfield Maintenance Workers omitted from the eligibility list cast ballots. The Chairman challenged the Lead Airfield Maintenance Workers' ballots on the ground that their names did not appear on the voter eligibility list. The Chairman subsequently overruled the challenges to these ballots and the ballots of the ten Lead Airfield Maintenance Workers were counted. The one Lead Airfield Maintenance Worker that did not vote in the election is a member of the Union.

Additionally, seven of the newly reclassified Painters cast ballots in the election. The Chairman challenged the Painters' ballots on the ground that they were no longer in the bargaining unit represented by the Union. The Chairman subsequently sustained the challenges to these ballots and the Painters' ballots were not counted.

There were also five void ballots cast in the election. The ballots were clear and the ballot instructions were simple. The voter was instructed to "MARK AN "X" IN THE SQUARE OF YOUR CHOICE." There was a square for "YES" and a square for "NO." The voter was also instructed on the ballot as follows: "DO NOT SIGN THE BALLOT FOLD AND DROP IN THE BALLOT BOX." Four of the void ballots contained marks in both the "yes" and "no" boxes. The fifth void ballot was marked "no," but the worker signed the ballot. The five void ballots were not counted.

The results of the election were 69 votes against retaining the Union as the bargaining representative and 61 votes in favor of retaining the Union as the bargaining representative. The Union filed timely objections to the conduct of the election.

CONCLUSIONS OF LAW

This Board is charged with deciding issues concerning majority representative status by virtue of Section 105.525 RSMo. 2000 which provides: "Issues with respect to appropriateness of bargaining units and majority representative status shall be resolved by the State Board of Mediation." Missouri statutory law does not set out any criteria as to the means to be used by the Board in resolving issues of majority representative status. "The General Assembly left the means to be used to the discretion of the Board." *City of Kirkwood v. Missouri State Board of Mediation*, 478 S.W.2d 690, 695 (Mo. App. 1972).

Pursuant to its statutory authority, the Board promulgated 8 CSR 40-2.160. That regulation provides in pertinent part:

(8) If objections are filed to the conduct of the election or conduct affecting the result of the election or if the challenged ballots are sufficient in number to affect the result of the election, the chairman shall investigate such objections or challenges or both.

(9) Where objections are filed or challenges are determinative, the chairman shall conduct an investigation and, where appropriate, shall issue a notice of hearing for the board to hear the matters alleged and to issue a report and recommendations. The objecting party shall bear the burden of proof regarding all matters alleged in the objections to the conduct of the election or conduct affecting the results of the election.

As previously set forth in the Findings of Fact, on September 20, 2001, the Board conducted an election to determine whether the Union would be decertified as the bargaining representative for certain employees for the City employed at the Airport. The results of the election were 69 votes against retaining the Union as the bargaining representative and 61 votes in favor of retaining the Union as the bargaining representative. The Union filed timely objections to the conduct of the election.

The Union's objections stated as follows:

1. At the time of the election, seven painters not properly a part of the bargaining unit, and therefore not eligible to vote, were allowed to vote.
2. At the time of the election, ten lead workers were allowed to vote. These lead workers, although properly a part of the bargaining unit, were among 11 lead workers improperly omitted from the list of eligibles. They therefore received no information about the election prior to the election.
3. The seventeen challenged ballots, that is, those of the painters and the lead workers, were disallowed by the Board.
4. Once those seventeen challenged and improperly cast ballots were disallowed, the result of the election was a vote of 61-58 in favor of decertification of the Union.³
5. In addition to the 17 challenged ballots, there were five other ballots cast in the election of September 20, 2001 that were voided.
6. The Union believes, after investigation, that if a new election were held and the votes of the persons who cast the voided ballots were properly cast and counted, and the lead workers eligible to vote were allowed to vote after being

³ Paragraph 4 does not appear to be an objection to the conduct of the decertification election. Paragraph 4 contains an incorrect statement which appears to relate to the Union's objection in paragraph 3. The Union abandoned its objection in paragraph 3. Therefore, the Board will not specifically address the statement in paragraph 4.

informed about the election and the issues therein, the result of the decertification election would be reversed.⁴

7. On the date of the election, the Union had only one election observer instead of two observers, as allowed by state regulations, 8 CSR 40-2.180.

8. On the date of the election, airport police detained representatives of the Union and prevented them from circulating information about the election, in violation of both proper election procedures and the constitutional rights of the Union and the individual representatives.

The Chairman, pursuant to 8 CSR 40-2.160, investigated the Union's objections and determined that a hearing was necessary to resolve the issues raised in the objections. A hearing on this matter was held on November 16, 2001, in St. Louis, Missouri. At the close of the taking of evidence, the Union abandoned its objections in numbered paragraphs 3 and 7. The Board will address the Union's remaining objections. Additionally, at the hearing, the parties presented evidence on additional issues and the parties briefed these additional issues. The Board will also address these additional issues raised by the parties.

Representation elections are not to be set aside lightly. *Deffenbaugh Industries, Inc. v. National Labor Relations Board*, 122 F.3d 582, 586 (8th Cir. 1997); *Selkirk Metalbestos, North America, Eljer Manufacturing, Inc., v. National Labor Relations Board*, 116 F.3d 782, 787 (5th Cir. 1997). There is a strong presumption that ballots cast under the Board's safeguards reflect the true desires of the employees. See, *Deffenbaugh Industries, Inc. v. National Labor Relations Board*, 122 F.3d at 586; *Selkirk Metalbestos, North America, Eljer Manufacturing, Inc., v. National Labor Relations Board*, 116 F.3d at 787.

As the objecting party, the Union bears the burden of proof in this case. 8 CSR 40-2.160(9). "A party challenging an election carries the heavy burden of proving there were improprieties which interfered with the employees' free choice to such an extent that they

⁴ Paragraph 6 contains an opinion expressed by the Union and is not a proper objection to the conduct of the election. However, to the extent paragraph 6 raises issues raised elsewhere by the Union, the Board will discuss those issues.

materially affected the outcome of the election.” *Deffenbaugh Industries, Inc. v. National Labor Relations Board*, 122 F.3d at 586.

The party challenging the election must demonstrate that unlawful acts materially affected the results of the election. In challenging a representation election, the objecting party bears the entire burden of adducing *prima facie* facts sufficient to invalidate the election. Conclusory allegations or proof of mere misrepresentations or physical threats are insufficient to meet this heavy burden. Specific evidence of specific events is required that shows not only that the acts occurred, but also that they “interfered with the employees’ exercise of free choice to such an extent that they materially affected the results of the election.” [Citations omitted.]

Selkirk Metalbestos, North America, Eljer Manufacturing, Inc., v. National Labor Relations Board, 116 F.3d at 787. The challenging party must prove that there was prejudice to the fairness of the election. *National Labor Relations Board v. Mattison Machine Works*, 365 U.S. 123, 81 S.Ct. 434, 5 L.Ed.2d 455 (1961); *See also, Missouri National Education Association v. Missouri State Board of Mediation*, 695 S.W.2d 894, 897 (Mo. banc 1985).

Therefore, to set aside the decertification election, the Union, as the objecting party, must prove not only that the acts occurred, but also that the acts “interfered with the employees’ exercise of free choice to such an extent that they materially affected the results of the election.” *See, Selkirk Metalbestos, North America, Eljer Manufacturing, Inc., v. National Labor Relations Board*, 116 F.3d at 787. *See also, Missouri National Education Association v. Missouri State Board of Mediation*, 695 S.W.2d at 897; *Service Employees International Union, Local 96, AFL-CIO v. Hickman Mills School District Consolidated School District No. 1, Kansas City, Missouri*, Public Case No. 80-021 (SBM 1981).

In *Missouri National Education Association v. Missouri State Board of Mediation*, the Union designated as its election observer one of its own employees, Anita Bimby. The District argued that the person designated by the Union as its election observer was not qualified to be an election observer under the Board’s regulation [8 CSR 40-2.160(1)]. The District went on to

argue that the certification election should be set aside for failure to comply with the Board's rule.

The Court in *Missouri National Education Association v. Missouri State Board of Mediation*, 695 S.W.2d at 897 stated as follows:

Assuming, without deciding, that Board Rule 8 CSR 40-2.160(1) prohibits employees of a labor Union who are not "non-supervisory employees of the public employer" from serving as observers, we fail to see how any of the interested parties could have been prejudiced by Bimby's mere presence at the polls.

* * *

The observers ... stipulated that "[d]uring the hours of the election * * * none of the parties [observers] left the polling location and no electioneering, intimidation, or coercion was observed * * *." The record is void of any evidence indicating irregularity in the election proceedings. We conclude that the mere presence of a Union employee at the election site, without more, was not inherently destructive of the conditions necessary for a fair election and the election results should stand.

In *Service Employees International Union, Local 96, AFL-CIO v. Hickman Mills School District Consolidated School District No. 1, Kansas City, Missouri*, the Union filed objections to the election. The Union contended that the School District's conduct was sufficient to set aside the election. One of the Union's objections was based upon the fact that School District supervisors told two of the custodians that the District would look into subcontracting out custodial work if the Union won the election. The Board rejected the Union's objection stating, "it is clear that no employee was intimidated by the possibility of subcontracting the work." *Service Employees International Union, Local 96, AFL-CIO v. Hickman Mills School District Consolidated School District No. 1, Kansas City, Missouri*, Public Case No. 80-021 at 7.

The Union also objected to the election on the ground that the School District's election observer, Earl Yuille, was the supervisor of one of the employees voting in the election. In rejecting the Union's objection the Board stated that "[d]espite the use of a supervisor as an observer, the record shows that the one employee (Rezendez) who may have been under the supervision of the observer freely admitted that his vote was in no way influenced by the

presence of Yuille. Consequently, noncompliance with the Board rule is not, given the facts of the case, justification for setting aside the election.” *Id.*

BALLOTS OF THE SEVEN PAINTERS

Now turning to the Union’s first objection in this case, the Union contends that seven newly reclassified painters, not properly a part of the bargaining unit and therefore, not eligible to vote, were allowed to vote in the decertification election. The Union did not brief this issue. It appears therefore, that the Union has abandoned this objection. See, *In the Interest of I.B. v. D.M.B.*, 48 S.W.3d 91, 102 n.3 (Mo. App. W.D. 2001); *Freeman v. Leader National Insurance Company*, 58 S.W.2d 590, 599 (Mo. App. E.D. 2001).

Furthermore, it is true that seven of the newly reclassified Painters cast ballots in the election, but the Chairman challenged the Painters’ ballots on the ground that they were no longer in the bargaining unit represented by the Union. The Chairman subsequently sustained the challenges to these ballots and the Painters’ ballots were not counted.

The Union failed to carry its burden of proof with regard to this objection to the election. Therefore, the Board rejects the Union’s objection to the conduct of the election based upon the ballots of the Painters.

OMISSION OF THE LEAD AIRFIELD MAINTENANCE WORKERS

The Union also objects to the conduct of the election on the ground that eleven Lead Airfield Maintenance Workers were omitted from the voter eligibility list. The Lead Airfield Maintenance Workers have been included in the bargaining unit since January 10, 1994, and they were eligible to vote in the decertification election. However, when the City prepared the voter eligibility list, they omitted the Lead Airfield Maintenance Workers. Ten of the eleven Lead Airfield Maintenance Workers cast ballots in the decertification election. The Chairman challenged the Lead Airfield Maintenance Workers’ ballots because their names did not appear

on the voter eligibility list. The Chairman subsequently overruled these challenges and counted the ballots of the ten Lead Airfield Maintenance Workers.

The Board requires substantial compliance with the voter eligibility list requirement. *Service Employees International Union, Local 96, AFL-CIO v. Hickman Mills School District Consolidated School District No. 1, Kansas City, Missouri*, Public Case No. 80-021 at 5-6. The Board will sustain an election where there is substantial compliance with the voter list requirement and the omissions or inaccuracies are not attributable to the employer's gross negligence or bad faith. *Id.*

In this case there was substantial compliance with the voter eligibility list requirement. There were 205 eligible voters in the bargaining unit. Eleven eligible voters were omitted from the voter eligibility list. This is an error rate of approximately five percent. There was substantial compliance. See, *Advance Industrial Security*, 230 NLRB 72 (1977); *West Coast Meat Packing Co.*, 195 NLRB 37 (1972).

Additionally, the evidence in the record does not establish that the City was guilty of gross negligence or bad faith. The voter eligibility list was prepared by the Comptroller's Office and forwarded to the Department of Personnel. It appears that the Department of Personnel assumed the list was accurate and forwarded it to the Board without reviewing the list. Clearly, the Department of Personnel made a mistake by not reviewing the list before forwarding it to the Board, but such a mistake, in the context of this case, does not rise to the level of gross negligence or bad faith.

Certainly, the Union should not be heard to complain on this point because the Union failed to review the list when requested to do so by the Chairman. On August 20, 2001, a full month before the election, the Chairman mailed a copy of the voter eligibility to the Union. In his cover letter, the Chairman requested that the Union review the voter eligibility list and inform him of any problems. The Union could have used the bi-weekly payroll report regarding the

deduction of Union dues and fair share fees to verify the accuracy of the voter eligibility list. However, no Union official reviewed the voter eligibility list to determine if it was accurate.

The Board also thinks it is important to note that this is a decertification election, and the Union should have been aware of which employees were in the bargaining unit. The Union has been the certified bargaining representative for the unit since September 22, 1986. The Lead Airfield Maintenance Workers have been included in the unit since January 10, 1994. Nine of the eleven Lead Airfield Maintenance Workers are Union members. The Union receives Union dues and fair share fees which are deducted from the employees' wages. The Union receives a bi-weekly payroll report from the City regarding these deductions. Finally, the Union maintains records on its members. Therefore, the Union should have known which City employees were in the bargaining unit.

The Union also contends that the Lead Airfield Maintenance Workers were uninformed with regard to the issues involved in the election. However, the Union failed to present any specific evidence showing that the Lead Airfield Maintenance Workers were uninformed regarding the issues. Mere conclusory allegations or proof are not sufficient to prove that the Lead Airfield Maintenance Workers were uninformed regarding the issues. See, *Selkirk Metalbestos, North America, Eljer Manufacturing, Inc., v. National Labor Relations Board*, 116 F.3d at 787. Specific evidence is required. *Id.* The Union failed to produce any specific evidence on this point. No Lead Airfield Maintenance Worker testified at the hearing, and there was no specific evidence tending to show that the Lead Airfield Maintenance Workers were uninformed.

Ten of eleven Lead Airfield Maintenance Workers cast ballots in the election. The only Lead Airfield Maintenance Worker who did not cast a ballot is a Union member. Additionally, the election was well publicized inside the Airfield Maintenance Department and it was a topic of conversation among the employees. The Union also held a meeting inside the Airfield

Maintenance Building. Clearly, the Lead Airfield Maintenance Workers were aware of the election and ready to express their opinions by casting their ballots.

Based upon the foregoing, the Union has failed to carry its burden of proof with regard to this objection to the conduct of the election. The Board rejects this objection to the conduct of the election.

FIVE VOID BALLOTS

The Union also objects to the fact that five ballots cast in the decertification election were voided. The Union did not brief this issue. Therefore, it appears that the Union has abandoned this objection. See, *In the Interest of I.B. v. D.M.B.*, 48 S.W.3d 91, 102 n.3 (Mo. App. W.D. 2001); *Freeman v. Leader National Insurance Company*, 58 S.W.2d 590, 599 (Mo. App. E.D. 2001).

However, the Chairman properly determined that the five ballots in question were void. Four of the void ballots contained marks in both the “yes” and “no” boxes. The fifth void ballot was marked “no,” but the voter signed the ballot. The five void ballots were not counted.

The ballots are clear and the instructions simple. The voter is instructed to “MARK AN “X” IN THE SQUARE OF YOUR CHOICE.” There is a square for “YES” and a square for “NO.” Four of the ballots contain marks in both the yes and no squares. This prevents the Board from determining the true intent of the voters in question.

The voter is also instructed on the ballot as follows: “DO NOT SIGN THE BALLOT FOLD AND DROP IN THE BALLOT BOX.” The fifth void ballot was signed by the voter contrary to the instructions on the ballot. The election was by secret ballot. If the voters sign the ballots, it defeats the whole purpose of a secret ballot election.

Finally, the Board’s election procedures, 8 CSR 40-2.160, contain no provision for the recasting of void ballots. Since the election was by secret ballot, the Board cannot ascertain the identity of the voters (except for the voter that signed the ballot) that cast the void ballots.

The Union failed to carry its burden of proof with regard to the issue of the void ballots. Therefore, the Board rejects the Union's objection concerning the five void ballots.

DETENTION OF UNION REPRESENTATIVES

The Union also objects to the conduct of the election on the ground that the Airport Police detained Union representatives on the date of the election. The Union's representatives were never detained or taken into custody by the Airport Police. This case is clearly distinguishable from the case relied upon by the Union, *National Labor Relations Board v. Springfield Hospital*, 899 F.2d 1305 (2nd Cir. 1990). In *Springfield Hospital*, the Hospital caused the arrest of four off-duty employees engaged in pro-Union activities prior to the Union election. Since the Union's representatives in this case were never officially detained or taken into custody by the Airport Police, this case is clearly distinguishable from the *Springfield Hospital* case.

The Union failed to carry its burden of proof with regard to this objection to the election. The Board rejects the Union's objection to the conduct of the decertification election based upon the ground that the Union's representatives were detained on the date of the election.

PREVENTION OF LEAFLETING

The Union also objects to the conduct of the election on the ground that on three occasions the Airport Police stopped Union representatives and workers from distributing Union leaflets to workers outside the gate to the Airfield Maintenance Department. It is important to note that all three of these incidents occurred after the terrorist attacks of September 11, 2001. The Board specifically holds that these incidents were motivated, not by Union animus, but by real Airport security concerns.

That is not to say that the Airport did not make mistakes. First, Mr. Martocci, the Airport's Human Resource Manager, should have given the Union permission in writing to

distribute literature to workers outside the gate at the Airfield Maintenance Department. While the Airport had an informal policy by which Union representatives were required to obtain only verbal permission from Mr. Martocci to conduct Union activities, after the terrorist attacks on September 11, 2001, it was not business as usual. A written document from Mr. Martocci could have prevented these incidents.

Secondly, when Mr. Martocci called the Airport Police Department to advise them that the Union had his permission to distribute literature, this information was not conveyed to the appropriate Airport Police personnel. If this information had been conveyed to the Police Officers in the field, these incidents may have been avoided.

As for the Union, after the events of September 11, 2001, it should have expected heightened security at the Airport and taken additional steps to acquire access to those areas of the Airport where they wanted to engage in election campaign activities.

While it is true that the Airport Police stopped Union representatives from distributing leaflets outside the gate to the Airfield Maintenance Department on three occasions, the Union failed to prove that this interfered with the employees' exercise of free choice to such an extent that it materially affected the results of the election. The Airport has a liberal policy concerning Union representatives' access to Airport employees. The decertification petition was filed on June 29, 2001. The election was not held until September 20, 2001. The Union had nearly three months to distribute literature to the employees in the bargaining unit and to inform the employees of the issues involved in the election. The Board fails to see how being prevented on three occasions from distributing literature materially affected the results of the election.

The Union also had other means of communication available to it. The Union mailed various leaflets to the workers. The Union conducted a telephone calling campaign. The Union was also permitted to conduct a meeting inside the Airfield Maintenance Building prior to the election.

The Union's own witness, Mike Dattoli, testified that the election was well publicized within the Airfield Maintenance Department. The election was also a topic of discussion among the employees in the Airfield Maintenance Department.

Based upon the foregoing, the Board holds that the Union failed to carry its burden of proof that the Airport Police by stopping Union representatives from distributing leaflets on three occasions interfered with the employees' exercise of free choice to such an extent that it materially affected the results of the election. Therefore, the Board rejects the Union's objection to the conduct of the election based upon those three incidents.

CARPENTERS' UNION MEETING

The Union also raises as an issue the fact that the Carpenters' Union was permitted to hold a meeting in the Airfield Maintenance Building on September 13, 2001. The Union maintains the Joann Williams, Business Agent for the Carpenters' Union, made statements encouraging Airfield Maintenance Workers to leave the Union and join the Carpenters' Union. However, there is no credible evidence in the record that Ms. Williams made such statements and the Board did not find that she made such statements. Ms. Williams was there to speak to the newly reclassified Painters about joining the Carpenters' Union. The meeting was intended for the Painters and was set at a time when all of the Painters would be getting off work. Ms. Williams was not there to solicit the membership of Airfield Maintenance Workers.

The Union also maintains that anti-Union fliers were distributed at the Carpenters' meeting. There is no credible evidence in the record that Ms. Williams or her assistant distributed any literature at the meeting and the Board did not find that they distributed any literature at the meeting.

Additionally, the Union raises the issues concerning distribution of Carpenter Union Logo hats and the serving of pastries. It is true that 10 to 15 Carpenter Union hats were distributed during the meeting. There were ten newly reclassified Painters in the Airfield

Maintenance Department. The only person positively identified as receiving a hat was Adrian Mrosewski. Mr. Mrosewski was on the painting crew. There is no evidence in the record that any of the hats were distributed to Airfield Maintenance Workers.

As far as the pastries are concerned, the Union failed to produce any evidence to show that the pastries influenced any worker to vote against the Union in the decertification election. The Union's Shop Steward, Tim Tippit, testified that he ate a piece of cheesecake at the Carpenters' meeting, but Mr. Tippit also testified that the cheesecake did not influence the way he voted in the decertification election. The Board fails to see how the pastries could have materially affected the outcome of the election.

The Union also states in its brief "When [Union] officials learned of this meeting, they sought comparable access." Union's brief at 11. The Union never requested a meeting inside the Airfield Maintenance Building. When Perry Molens, the Union's Business Agent, called the City's Personnel Director, Bill Duffy, to complain about the Carpenters' meeting, Mr. Duffy offered to give the Union equal time. The Union then waited two more days before they accepted Mr. Duffy's offer. The Union did hold a meeting inside the Airfield Maintenance Building prior to the decertification election.

The Board does recognize that the Carpenters' meeting was ill timed. It would have been better for the Airport to postpone the Carpenters' meeting until after the decertification election. However, the Airport's granting of permission to Joann Williams to hold a meeting inside the Airfield Maintenance Building was not based upon any animus against the Union, but instead, upon Airport's desire to grant all Union's representing Airport employees liberal access to those employees.

Based upon the foregoing, the Board finds that the Carpenters' meeting did not materially affect the outcome of the election. The Union failed to carry its burden of proof with regard to this issue.

JOB ACTIONS AGAINST UNION LEADERS

The Union maintains that the Airport took adverse job actions against Union leaders due to their Union activities. The first event of which the Union complains is that Leroy Rogers, Airfield Maintenance Supervisor, and Mike Bryant, Lead Foreman in the Airfield Maintenance Department, held a meeting with Tim Tippit and Mike Dattoli at which Mr. Tippit and Mr. Dattoli were allegedly told that they could not talk about Union business even on break time. However, the meeting was in fact in response to an argument that occurred between Tim Tippit, the Union's Shop Steward, and Richard Brucker, a member of the Carpenters' Union. The argument involved some name-calling and "slandering" between Mr. Tippit and Mr. Brucker. Mike Dattoli, a Union member, and Bruce Crawford, a Painter, were also involved in the incident. At the meeting Mr. Rogers told Mr. Tippit and Mr. Dattoli that such conduct would stop. Mr. Rogers and Mr. Bryant also held a separate meeting with Mr. Brucker and Mr. Crawford and informed those individuals also that such conduct would stop. Mr. Rogers did not tell Mr. Tippit and Mr. Dattoli that they could not discuss Union business. As the United States Court of Appeals, Eighth Circuit noted in *Deffenbaugh Industries, Inc. v. National Labor Relations Board*, 122 F.3d at 586 "[i]t is recognized that a 'certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election.'" The meeting with Mr. Tippit and Mr. Dattoli was motivated by need to maintain order in the workplace and not by any Union animus on the part of Mr. Rogers or Mr. Bryant.

The Union also complains that Mr. Tippit was transferred to the midnight shift because of his Union activities. Mr. Tippit's transfer was not related to his Union activities. Mr. Tippit's transfer was based upon several years of personal conflict between Mr. Tippit and Mike Bryant, Lead Foreman. The conflict between Mr. Tippit and Mr. Bryant had escalated and Mr. Tippit was transferred to another shift.

Finally, the Union mentions alleged comments on Mr. Tippit's quarterly employee evaluation for the calendar quarter ending September 30, 2001. However, Mr. Tippit's quarterly employee evaluation was introduced into evidence and the evaluation does not contain any reference to Mr. Tippit's Union activities. The evaluation does indicate that the Airport paid Mr. Tippit his regular salary while he served as the Union's election observer on the day of the decertification election.

The Union failed to prove that the Airport took unfavorable job actions against Mr. Tippit and Mr. Dattoli based upon their Union activities. The Union has failed to carry its burden of proof on this issue.

COMMENTS BY SUPERVISORS

The Union also maintains that supervisors within the Airfield Maintenance Department made disparaging remarks about the Union. Union Business Agent, Perry Molens testified that at the conclusion of his meeting with the Airfield Maintenance employees, as he left the room, he heard Leroy Rogers say, "There goes a nothing Union." Mr. Rogers denied making the comment. Tim Tippit, the Union Shop Steward, testified that on several occasions he heard foremen tell employees they should sue the Union. However, Mr. Tippit did not identify the foremen by name. Based upon this evidence, the Board did not find as a fact that the comments were made.

Even if the comments were made, the Union failed to produce specific evidence that the comments interfered with the employees' free choice to such an extent that it materially affected the results of the election. It is not sufficient to prove that the comments were made. *See, Service Employees International Union, Local 96, AFL-CIO v. Hickman Mills School District Consolidated School District No. 1, Kansas City, Missouri*, Public Case No. 80-021 at 6-7. It must be proven that the comments interfered with the employees' free choice. *Id.* The

Union failed to produce specific evidence showing that the comments interfered with the employees' free choice.

Based upon the foregoing, the Union failed to meet its burden of proof with regard to this issue.

DISTRIBUTION AND POSTING OF ANTI-UNION FLIERS

The Union also complains that the Supervisors within the Airfield Maintenance Department tolerated liberal distribution and posting of anti-Union material. The Airfield Maintenance Department has a policy regarding the posting of Union documents and notices. All Union documents have to be posted on the Union bulletin board. The bulletin board is for the use of all Unions representing employees within the Airfield Maintenance Department. Union documents have to be on Union letterhead and they have to have an expiration date on the document. Union documents cannot be posted on the windows and walls of the Airfield Maintenance Building.

Prior to the decertification election fliers encouraging workers to decertify the Union and join the Carpenters' Union were circulated and posted in the Airfield Maintenance Department. These fliers appeared to be produced on a computer and were printed in black ink on plain white paper. The fliers also appeared to have been copied on a copy machine. The fliers were not on a Union letterhead and the fliers did not contain a Union logo. There is no credible evidence as to who produced, distributed, and posted the fliers.

There was a wide divergence in the testimony concerning the extent of the posting of the anti-Union fliers. According to some Union witnesses, the fliers were posted everywhere in the Airfield Maintenance Department. In contrast, Mr. Rogers, Airfield Maintenance Supervisor testified that the fliers were posted on the bulletin boards, one wall and one window. The Board believes that the truth lies somewhere in the middle. The Board found as a fact that the fliers

were posted on the bulletin boards, and on at least one wall and one window, in the Airfield Maintenance Building in violation of Department policy.

However, the evidence does not establish that Airport Management or Airfield Maintenance Department Supervisors condoned the improper posting of the fliers. Pat Martocci, Human Resource Manager for the Airport, was unaware of the fliers being improperly posted. Mr. Rogers, Airfield Maintenance Supervisor, did not see any improperly posted fliers. Further, the Foremen in the Airfield Maintenance Department had been instructed to remove any improperly posted fliers. Mike Bryant, Lead Foreman, did remove some improperly posted fliers. These facts tend to show that Airport Management or Airfield Maintenance Department Supervisors did not condone the improper posting of the fliers.

The Union also failed to produce specific evidence that the fliers affected the way the employees voted or materially affected the outcome of the election. No employee testified that the fliers influenced the way they voted in the decertification election. Conclusory allegations or speculation are not sufficient for the Union to meet its burden of proof. *See, Selkirk Metalbestos, North America, Eljer Manufacturing, Inc., v. National Labor Relations Board*, 116 F.3d at 787.

Based upon the foregoing, the Union has failed to meet its burden of proof with regard to this issue.

Finally, considering all of the issues raised by the Union as a whole, the Board finds that the conditions necessary for a fair election had not been destroyed in this case. The atmosphere in the Airfield Maintenance Department was not such as to render a free expression of choice impossible. *See, Deffenbaugh Industries, Inc. v. National Labor Relations Board, supra; Selkirk Metalbestos, North America, Eljer Manufacturing, Inc., v. National Labor Relations Board, supra.* Both the City and the Union made mistakes. However, the mistakes made by the City did not materially affect the outcome of the election. Those mistakes also

were not so destructive of the conditions necessary for a fair election as to require the setting aside of the election results in this case.

The Board overrules the objections and issues raised by the Union. The Board holds that the election results in this case should be certified.

ORDER

The State Board of Mediation overrules the objections to the conduct of the election filed by the Union. The Board also overrules the additional issues raised by the Union in the hearing and in its brief. The Board hereby orders that the election results in this case be certified.

Signed this 19th day of February, 2002.

STATE BOARD OF MEDIATION

(SEAL)

/s/ John A. Birch
John Birch, Chairman

/s/ LeRoy Kraemer
LeRoy Kraemer, Employee Member

/s/ Lois Vander Waerdt
Lois Vander Waerdt, Employer Member